BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS OF COURT

The opinions of the Supreme Court of the State of Utah are not yet reported in the Utah Reports but are reported in 101 Pac. (2d) 375. They appear in the record filed herewith at pages 70 to 81. The date of the judgment to be reviewed is April 19, 1940 (R. 81) to which a petition for rehearing was timely filed and denied November 12, 1940. (R. 83). Under date of February 5, 1941 Honorable Associate Justice Stanley Reed upon application of petitioners granted them to March 12, 1941 to file petition for certiorari. (R. 93).

II

JURISDICTION OF COURT

The statutory provisions which are believed to maintain the jurisdiction of this Court are Paragraphs A and B of Section 344, Title 28, U.S.C.A. (Judicial Code 237 Amended) whereby it shall be competent for this Court to review and determine any cause where a final judgment has been entered in any suit in the highest court of the State in which a decision in the suit could be had, where is drawn in question the validity of the statute of any State on the ground of its being repugnant to the Constitution of the United States and the decision is in favor of its validity; and Paragraph B of said Section 355, Title 28, U.S.C.A. (Judicial Code 237 Amended) whereby it shall be competent for this Court by certiorari to review and determine any cause where a final judgment has been rendered by the highest court of a State in which a decision could be had where any title, right, privilege or immunity is especially set up or claimed by either party under any statute or the Constitution of the United States. Also under Rule 38, Paragraph 5, Section A of the revised

rules of this Court, wherein it is provided that a review on a writ of certiorari may be had

> "Where a State Court has decided a Federal question of substance not heretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court."

The petitioners here, plaintiffs below, are stockholders in the Provo Bench Canal & Irrigation Company, respondent here and defendant below, which Company is a mutual irrigation company organized under the laws of the Territory of Utah, on February 26, 1887. That after the organization of the Company the legislature of the State of Utah enacted certain statutes hereinafter specifically referred to, which statutes, when construed and applied as they were construed and applied by the Supreme Court of the State of Utah, constitute an impairment of a contract contrary to the provisions of

> Article I, Section 10 of the Constitution of the United States.

That certain statutes hereinafter referred to enacted by the legislature of the State of Utah, when construed and applied as they were construed and applied by the Supreme Court of the State of Utah and the decree and decision rendered by such Court, constitutes the taking of the property of petitioners herein, plaintiffs below, without due process of law and denies the petitioners the equal protection of the law, contrary to the Fourteenth Amendment of the Constitution of the United States. That the opinion of the Supreme Court of the State of Utah, by its decision rendered herein in ignoring or construing certain acts of the Congress of the United States hereinafter referred to denies to the petitioners herein, plaintiffs below, rights, privileges and immunities claimed by them under certain acts of Congress hereinafter referred to and under the Constitution of the United States. That the decision of the Supreme Court of the State of Utah has decided a Federal question of substance not hereto-

fore determined by this Court and has decided it in a way probably not in accord with applicable decisions of this Court.

STATEMENT OF CASE

The petitioners here, plaintiffs below, are owners in severalty of fully paid up shares of stock in the Provo Bench Canal & Irrigation Company, a respondent herein, defendant below. The other defendants are members of the Board of Trustees of the Company. The respondent company was organized on February 26, 1887. The purpose of the corporation as expressed in its articles of incorporation was to convey water from Provo River to Provo Bench and lands adjacent thereto, and to regulate and control the same for the purpose of irrigation. (R. 40). The articles of incorporation originally made the life thereof twenty-five years (R. 41). In 1910 the articles were amended extending the life of the corporation to fifty years (R. 43). In 1937 the articles of the Company were amended extending its life to one hundred years from and after February 26 1887. On May 7, 1938, (R. 44), at a meeting of the stockholders of the Company a resolution was passed by a majority vote, whereby the Board of Trustees of the Company were directed to purchase for and on behalf of the Company two thousand shares of the capital stock of the Provo River Water Users' Association and to enter into a contract for the purchase thereof according to the requirements of the Association and the regulations of the Department of the Interior of the United States. (R. 45).

At the same meeting a resolution was passed by a majority of the stockholders of the Company to so amend the articles of incorporation that it, among other things, may "acquire and own stock in other corporations organized or to be organized" and "to secure, guarantee and become surety for the payment or the performance of any contract, promissory note or other obligation that may

be or has been entered into with the United States or with any other person, firm or corporation in which this corporation has acquired by subscription or otherwise shares of stock, water or water rights or other rights incidental thereto." (R. 46).

Pursuant to the amendments of the articles of incorporation of the Company and the resolution authorizing and directing the board of trustees to enter into a contract to purchase two thousand shares of stock in the Association, the board of trustees of the Company determined to enter into a contract with the Association (R. 49). The proposed contract contained, among others, the following provisions:

> "9. The Company shall pay as the purchase price of the shares of stock in the Association herein subscribed for that proportion of the total sums and charges required to be paid by the Association to the United States under said Association-Government contract, for the construction of the works therein described and provided for, as computed and determined by the secretary in conformity with the provisions of Article 22 of the Association-Government contract, that the number of shares of the Association stock subscribed for by the Company shall bear to the total number of shares of such stock outstanding and assessable at the time the construction of the works described in Article 2 hereof is authorized by the secretary." (R. 53).
>
> "10. The sums or amounts to be paid under this contract (including deficiency assessments as stated in Article 8) as charges due the Association are to be paid by the Company in full without deductions on account of the failure of some of the stockholders of the Company to pay assessments and/or calls when due, and the Company agrees to levy and collect such deficiency assessments (to cover estimated and/or established defi-

ciencies) as may be necessary to enable the Company to pay such sums or amounts in full when due." (R. 54).

"11. The Company in the distribution of the water supply acquired hereunder shall comply with the provisions of the Act of June 17, 1902 (32 Stat., 388) and acts amendatory thereof or supplementary thereto, particularly those of the Warren Act of February 21, 1911 (36 Stat., 925) and regulations of the United States applicable thereto, and shall not furnish or deliver to any one landowner water in excess of an amount sufficient to irrigate 160 acres of irrigable land. Each subscriber of stock of the Association agrees with the Association and with each other subscriber that the Association may dispose of part of the stock of the Association to parties desiring to use project water for domestic, municipal, and industrial purposes as permitted by the Act of February 25, 1920 (41 Stat., 451), and every share of Association stock shall be entitled annually (annually for this purpose shall be the yearly period from November 1 of each year to October 31 of the following year) to its pro rata share (but not exceeding one acre foot of water per share annually measured at the Reservoir, as also provided by the Articles of Incorporation of the Association) of the water developed by this project and in the use of the project works, it being by this project and in the use of the project works, it being agreed that the project works contemplated to be constructed and acquired pursuant to said Association-Government contract are the only practicable source of water supply for those organizations participating in the project pursuant to the Act of February 25, 1920. (41 Stat., 451) and that the delivery and use of such pro rata share of the water of such users shall not be deemed less beneficial nor shall it be deemed

detrimental to the water service for irrigated lands serviced by the project, notwithstanding that shortages in supply are expected at times.

The project water in any such annual period available in excess of a supply of one acre foot per share of Association stock may be disposed of by the Association to shareholders or others subject to the approval of such disposition by the secretary. The rights of the Company and its assigns hereunder are subject to the provisions of Section 13 of the Boulder Canyon Project Act, approved December 21, 1928, (45 Stat., 1064). The basis, the measure and the limit of the right of the Company to use of said water acquired through its subscription for shares of stock of the Association shall rest perpetually in the beneficial application of the same. The Company shall cause said water to be put to a beneficial use in accordance with the law." (R. 54-55).

INDEBTEDNESS ASSUMED

"Anything herein to the contrary notwithstanding, it is agreed that the total aggregate liability of the Company for payment under the terms of this contract:

(a) To the Association, for the purchase price of the stock of the Company in the Association shall not exceed the sum of $152,000; and

(b) To the Association, on account of the default of some other stockholders in the payment of purchase price of the stock of such other stockholder in the Association shall not exceed the sum of $53,200." (R. 57-58).

MANNER OF MAKING PAYMENT

"15. All moneys payable hereunder by the Company to the Association on account of (a) the purchase price of the stock of the Company in the

Association, and (b) of the default of some other stockholder in the payment of the purchase price of the stock of such other stockholder in the Association, shall be paid by the Company to the Association and the United States jointly." (R. 58).

PROVIDE SECURITY

"17. In order to protect, secure, and insure the Association in the payment by the Company of any and all sums of money to become due to the Association under the terms of this contract, the Company agrees to make, execute, and deliver to the Association, its mortgage, in a form and containing such terms and conditions as are acceptable to the Association, covering all the lands, premises, water, water rights, water filings, rights of way, reservoir rights, buildings, structures, improvements, dams, pipe lines, flumes, conduits, ditches, canals, reservoirs, easements, water appropriations, franchises and appurtenances now owned, used, occupied, enjoyed or possessed by the Company." (R. 59).

COMPANY TO OPERATE AND MAINTAIN CANALS

"18. The Company shall arrange to operate and maintain, without cost or expense to the Assosiation, any and all canals and facilities (other than the works provided for in Article 2 hereof) necessary to take and utilize the water to which the Company is entitled under and by virtue of this subscription." (R. 59-60).

The contract also provides that an action shall be brought for a judicial determination of the validity of the contract and that the same is binding on the Company. (R 59). Soon after the action was taken by the stockholders of the Company with respect to the amendments of its articles of incorporation and the passing of a resolution by a majority of its stockholders authorizing and direct-

ing its Board of Directors to enter into a contract for the purchase of additional water, the petitioners here, plaintiffs below, brought an action in the district court of Utah County and sought to enjoin the board of trustees of the Company from entering into the proposed contract on behalf of the Company. They also sought to have the Court declare that a majority of the stockholders of the company were without authority to amend the articles of incorporation in the manner proposed, and likewise that a majority of the stockholders of the company were without authority to authorize the board of trustees of the Company to enter into the proposed contract. (R. 15-16).

They alleged that if the articles were amended in the manner proposed, such amendment would have no force or effect because to give the amendments effect would constitute an impairment of the contract contained in the articles of incorporation of the company, contrary to the provisions of

Article I, Section 10 of the Constitution of the United States. (R. 15).

They also alleged that the purchase of additional water by the Company would be of no substantial benefit to them; that they already had sufficient water with which to irrigate their lands; that they could not beneficially use additional water; that if additional water were purchased their stock in the Company would be assessed for the payment of the purchase price thereof, and that if the contract was executed and enforced they would be irreparably injured. (R. 15). To the complaint the defendants below, respondents here, filed their answer and to the answer the petitioners here, plaintiffs below, filed a reply. The parties entered into a written stipulation whereby most of the facts deemed material were agreed upon. The petitioners here, plaintiffs below, offered to show that they were already supplied with sufficient water with which to irrigate their lands and that they would be unable to beneficially use any additional water. Upon objection of counsel for the respondents here, defendants below, the court sustained the objection. Upon

the facts so stipulated the district court of Utah County made its findings of fact and conclusions of law and entered judgment

> "That the defendants, and each of them, for and on behalf of the defendant, Provo Bench Canal & Irrigation Company, a corporation, are hereby enjoined from entering into and from performing the contract heretofore set out in the findings of fact, heretofore made and entered in this cause." (R. 63-64).

From the judgment so made and entered by the trial court the respondents here, defendants below, prosecuted an appeal to the Supreme Court of the State of Utah. Errors were assigned by them attacking the conclusions of law and decree (R. 65-68). The petitioners here, plaintiffs below, made cross-assignments of error attacking the ruling of the trial court in refusing to permit the petitioners here, plaintiffs below, to show that they already had sufficient water with which to irrigate their lands. (R. 69).

The respondents here, defendants below, filed their printed brief in which they contended that a majority of the stockholders of the Company had authority to amend its articles of incorporation in the manner proposed pursuant to

R. S. U. 1933, 18-2-44,

and that when the articles of incorporation were so amended by a vote of a majority of its stockholders the Company had authority to purchase stock in the Provo River Water Users' Association and to enter into the proposed contract pursuant to the provisions of

R. S. U. 1933, 100-1-13.

(Defendants' and appellants' brief, pages 12 to 26).

To the brief so filed by respondents here, defendants below, the petitioners here, plaintiffs below, filed their brief in which they contended that the proposed amendments to the articles of incorporation constituted a material, radical and fundamental change in the articles

of incorporation of the Company and required the consent of all of the stockholders of the Company. (Brief of plaintiffs' and respondents,' page 10). That the statutory provisions relied upon by defendants and appellants, if given effect as contended for by them, constitute an impairment of the contract contained in the articles of incorporation of the Company contrary to the provisions of

Article I, Section 10 of the Constitution of the United States,

and that if the proposed contract is executed and enforced it will result in the taking of the property of petitioners here, plaintiffs below, without due process of law. (Plaintiffs' and respondents' brief, pages 39 to 44). Petitioners here, plaintiffs below, also contended that the trial court was in error in refusing to permit plaintiffs to show that they, nor either of them, would not derive any benefit by the Company purchasing additional water. (Plaintiffs' and respondents' brief, pages 8 to 10).

To the brief of plaintiffs and respondents the defendants and appellants filed a reply brief in which they contended that the proposed amendments to the articles of incorporation of the Company were not so fundamental as to require the consent of all the stockholders and that Article XII, Section 1, of the Constitution of Utah permitted the legislature to alter, amend or repeal laws relating to corporations. (Reply brief of defendants and appellants, pages 14 to 38).

The Supreme Court of the State of Utah rendered its decision on April 19, 1940, and in the opinion of that Court it was held:

1.

That it was immaterial whether the plaintiffs did or did not derive any benefits from the purchase of additional water, and hence it was not error for the trial court to refuse to admit evidence touching that matter. (R. 77).

2.

That when in 1910 and in 1937 the articles of incorporation of the company were amended extending the life of

the corporation the statutory provisions of the Laws of the State of Utah as then in effect became a part of the articles of the Company and of the contract between the corporation and its stockholders. (R. 71 to 75).

3.

That the stock of the plaintiffs could lawfully be assessed to pay the purchase price of additional water and for the maintenance of the irrigation works constructed by the Federal Government, and that the contract between the Company and the Association was in all respects valid and enforceable. The Supreme Court of the State of Utah reversed the judgment made by the district court and remanded the cause to that court with directions that it amend its conclusions of law and decree to conform to the views expressed in the opinion of the Supreme Court of the State of Utah.

Thereafter petitioners here, plaintiffs below, timely filed their petition for rehearing, together with their written brief in support thereof. In their brief they urged, among other things, that if, as the Supreme Court of the State of Utah had held in its opinion, the laws of the State of Utah in effect when the articles of incorporation of the company were amended became a part of its articles and the contract between the stockholders, by the same token the provisions of

R. S. U. 1933, 100-1-14,

requiring that water appropriated for irrigation purposes in works constructed or controlled by the United States shall be appurtenant to specified lands owned or occupied by the person claiming the right to the use of water also became a part of the articles and the agreement contained therein. That if plaintiffs were required to pay for the purchase price of the additional water and the maintenance of the system constructed by the Federal Government, it would result in the confiscation of their property. That there is both a lawful and practical way whereby stockholders of the Company may acquire Deer Creek water. (Respondents' petition for rehearing and

brief thereon, pages 3 to 17 and pages 22 to 28). That if the proposed contract is entered into and enforced it will result in the confiscation of plaintiffs' property without due process of law and is against public policy. (Respondents' petition for rehearing and brief thereon, page 25).

Respondents herein, defendants below, filed their written brief in answer to the brief filed by the petitioners here, plaintiffs below, and urged that a rehearing should not be granted because the matters urged were not grounds for rehearing, and that the claim that the water must be appurtenant to lands is untenable. (Answering brief of defendants and appellants to plaintiffs' and respondents' reply brief for rehearing and to the brief filed therewith, pages 9 to 15). That under the Acts of Congress particularly the

Warren Act of February 21, 1911,

the United States was authorized to enter into the proposed contract and that the Act of Congress of August 18, 1894 and Congressional Acts supplementary thereto authorized the government to enter into the proposed contract. That before the validity of the proposed contract could be determined the Provo River Water Users' Association and the United States should be made parties to the proceeding. (Answering brief of defendants and appellants to plaintiffs' and respondents' petition for rehearing and to the brief filed therewith, pages 13 to 20). To the brief so filed by the defendants and respondents the plaintiffs filed a reply brief in which it was argued that neither the Association nor the United States was a proper party to the proceedings because the proposed contract was not yet executed and hence they had no legal interest in the cause being litigated, and that if they were necessary parties the opinion of the Supreme Court theretofore rendered should not stand until such time as all necessary parties were before the Court. (Respondents' Reply Brief on Petition for Rehearing, pages 14 to 17). A petition for rehearing was denied without an opinion being written on November 12, 1940.

THE LAWS OF THE STATE OF UTAH AND THE ACTS OF CONGRESS WHICH ARE DEEMED MATERIAL IN THIS CAUSE ARE:

LAWS OF UTAH:

The laws of the Territory of Utah in effect at the time of the incorporation of the Company so far as material here provided:

> "The name of such corporation may be altered. The number of its stockholders, trustees or officers may be changed by making the number greater or less (but in no case shall the number of said trustees or directors be less than three or more than thirteen). The articles of agreement or incorporation may be otherwise changed or amended, provided such amendment does not alter the original purpose of the corporation. But no such change shall be made except by a vote representing at least two-thirds of the capital stock at a stockholders' meeting called for that purpose."
>
> Laws of Utah, 1880, Page 2, and Laws of Utah. 1884, Page 70.

The statutory provisions of the laws of Utah at the time the stockholders directed the amendments to the articles of incorporation so far as material here provide:

> R. S. U. 1933, 18-2-44:
>
> "The articles of incorporation of any corporation now existing or that hereafter may be organized under the laws of this State may be amended in any respect conformable to the laws of this State in such manner and by the vote of such proportion of all or any class or classes of stock as the articles of incorporation may provide; and in case the articles of incorporation do not so provide, by a vote representing at least a majority

in amount of the outstanding stock thereof entitled to vote at a stockholders' meeting called for that purpose as prescribed in Section 18-2-45 . . . and provided further, that the original purpose of the corporation shall not be altered or changed without the approval and consent of all the outstanding stock, but the adding to the purposes or object or extending the power and business of the corporation shall not be deemed a change of the original purpose of the corporation."

In 1919, Laws of Utah, 1919, Section 11, Page 180, the Legislature of Utah enacted a law which is now R. S. U. 1933, 100-1-13, which provides:

"Any irrigation or reservoir company incorporated and existing under the laws of this State may purchase or subscribe for the capital stock of any other similar corporation which at the time of such purchase or subscription shall be or is about to be incorporated; provided, that such purchase or subscription shall be made only when permitted by the articles of incorporation, and such corporations are hereby permitted and authorized to amend their articles of incorporation so as to authorize such purchase or subscription"

In 1905 the

Laws of Utah, 1905, Chapter 108, Section 60, Page 162.

the legislature of the State of Utah enacted a law making it mandatory that water used for irrigation purposes under a Federal project must be made appurtenant to specified land. That law will be found in

R. S. U. 1933 100-1-14, and provides as follows:

"All water hereafter appropriated for irrigation purposes in works constructed or controlled by the United States shall be appurtenant to specified lands owned or occupied by the person claiming the right to use the water, so long as

the water is used beneficially thereon; provided, that if for any reason it should at any time become impracticable to use water beneficially or economically for the irrigation of any land to which the right of the same is appurtenant, said right may, on application to the State engineer, be severed from said land, and simultaneously transferred to and become appurtenant to other land, without losing priority of right theretofore established, if such change can be made without detriment to existing rights; and in case of such change, the owner of such water right shall execute and acknowledge a proper instrument of transfer describing therein the land from and to which such water is transferred, which instrument shall be recorded in the county recorder's office of the counties in which the lands are situated."

In 1919 the legislature of the State of Utah enacted a law providing for the creation of irrigation districts in order that water might be secured for lands within the districts and so that the lands benefited by the water should pay therefor in proportion to the benefits accruing to the land by the securing of additional water.

Laws of Utah, 1919, Chapter 68, Page 204.

The act was amended in 1929,

Laws of Utah, 1929, Chapter 68, Page 88.

That law was not brought forward into the Revised Statutes of Utah, 1933, but the provisions thereof were expressly retained by

R .S. U. 1933, 8-1-1.

Under the provisions of that act a petition must be signed by fifty or a majority of such land owners or by the Governor, requesting that the district be organized, whereupon notice must be given and an election held to determine whether or not the district shall be organized. If the district is organized at an election held for that purpose, water shall be allotted to the lands within the district and payments made for the water according to

the benefits accruing to the land to which the water is allotted, in conformity with the Act of Congress approved August 11, 1916.

THE LAWS OF THE CONGRESS OF THE UNITED STATES OF AMERICA WHICH ARE DEEMED MATERIAL HERE ARE:

The Act of June 17, 1902, known as the Reclamation Act, contains among other the following provisions:

> "Section 8. That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or territory relating to the control, appropriation, use or distribution of water used in irrigation or any vested right acquired thereto, and the Secretary of the Interior in carrying out the provisions of this act shall proceed in conformity with such laws and nothing herein shall in any way affect any right of any State or of the Federal Government or of any land owner, appropriator or user of water in, to or from any inter-State stream or the waters thereof; Provided, That the rights to use water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure and the limit of the right." (32 Stat., Page 390, Section 8, Chapter 1093).

The Warren Act mentioned in the contract, and which must be complied with by the Company, provides:

> Section 1. "That any homestead entryman under the act of June seventeenth, nineteen hundred and two, known as the reclamation act, including entrymen on ceded Indian lands, may at any time after having complied with the provisions of law applicable to such lands as to residence, reclamation, and cultivation submit proof

of such residence, reclamation, and cultivation, which proof, if found regular and satisfactory, shall entitle the entryman to a patent, and all purchasers of water-right certificates on reclamation projects shall be entitled to a final water-right certificate upon proof of the cultivation and reclamation of the land to which the certificate applies, to the extent required by the reclamation act for homestead entrymen; Provided, That no such patent or certificate shall issue until all sums due the United States on account of such land or water right at the time of issuance of patent or certificate have been paid."

Section 2. "That every patent and water-right certificate issued under this act shall expressly reserve to the United States a prior lien on the land patented or for which water right is certified, together with all water rights appurtenant or belonging thereto, superior to all other liens, claims, or interests whatsoever for the payment of all sums due or to become due the United States or its successors in control of the irrigation project in connection with such lands and water rights.

Upon default of payment of any amount so due, title to the land shall pass to the United States free of all encumbrances, subject to the right of the defaulting debtor or any mortgagee, lien holder, judgment debtor, or subsequent purchaser to redeem the land within one year after the notice of such default shall have been given by payment of all moneys due, with eight per centum interest and cost. And the United States, at its option, acting through the Secretary of the Interior, may cause land to be sold at any time after such failure to redeem, and from the proceeds of the sale there shall be paid into the reclamation fund all moneys due, with interest as herein provided, and

costs. The balance of the proceeds, if any shall be the property of the defaulting debtor or his assignee: Provided, That in case of sale after failure to redeem under this section the United States shall be authorized to bid in such land at no more than the amount in default, including interest and costs."

The Act of August 11, 1916,

Chapter 319, 39 Stat. 566, Section 2, provides in part:

"That the cost of constructing, acquiring, purchasing, or maintaining the canals, ditches, reservoirs, reservoir sites, water, water right, rights of way, or other property incurred in connection with any irrigation project under said irrigation district laws shall be equitably apportioned among lands held under private ownership, lands legally covered by unpatented entries, and unentered public lands included in said irrigation district. Officially certified lists of the amounts of charges assessed against the smallest legal subdivision of said lands shall be furnished to the register and receiver of the land district within which the lands affected are located as soon as such charges are assessed; but nothing in this act shall be construed as creating any obligation against the United States to pay any of said charges, assessments, or debts incurred."

It will be observed that by the terms of the proposed contract between the Association and the Company, the Company

"shall comply with the provisions of the Act of June 17, 1902 (32 Stat. 388) and acts amendatory thereof or supplementary thereto, and particularly those of the Warren Act of February 21, 1911 (36 Stat. 925) and regulations of the United States applicable thereto."

While there have been numerous amendments to the acts of Congress above referred to, none of such amendments,

so far as we can ascertain, enlarge, abridge or impair the provisions of the Congressional acts above mentioned.

The respondent here, defendant below, Provo Bench Canal & Irrigation Company, is a mutual irrigation company and in no sense an irrigation district.

IV.

SPECIFICATIONS OF ERROR

1.

The Supreme Court of the State of Utah erred in holding and deciding that the articles of incorporation of the defendant Provo Bench Canal & Irrigation Company may lawfully be amended by a majority vote of its outstanding paid up capital stock, to the effect that said Company may lawfully enter into contracts with the United States or with other parties for the purchase, acquisition or lease of water rights and lands, easements in lands, dams, reservoir, canals and necessary irrigation works or parts thereof, and other property incidental to or necessary for the full enjoyment thereof, and to contract with the United States or other parties for the construction of such works (R. 86).

2.

The Supreme Court of the State of Utah erred in holding ing and deciding that the articles of incorporation of the Provo Bench Canal & Irrigation Company may lawfully be amended by a majority vote of its outstanding capital stock so that such Company may subscribe for, purchase or otherwise acquire and own stock in other corporations organized or to be organized, and to purchase its own stock, especially where the stock to be purchased is not in a corporation similar to the defendant Provo Bench Canal & Irrigation Company. (R. 86).

3.

The Supreme Court of the State of Utah erred in holding and deciding that the articles of incorporation of the

Provo Bench Canal & Irrigation Company may be lawfully amended by a majority vote of its outstanding stock so that its board of trustees may lawfully make and deliver its guarantee, mortgage, and other obligations to secure, guarantee and become surety for the payment or the performance of any contract, promissory note or other obligation that may be or has been entered into with the United States or with any other person, firm or corporation, in which the Provo Bench Canal & Irrigation Company has acquired by subscription, or otherwise, shares of stock, water or water rights, or other rights incidental thereto (R. 86).

4.

The Supreme Court of the State of Utah erred in so construing the provisions of R. S. U. 1933, 100-1-13, so that the articles of incorporation of the Provo Bench Canal & Irrigation Company may lawfully be amended by a vote of the majority of the stockholders, so that such Company may purchase stock or water in the Provo River Water Users' Association, to be paid for by assessments levied against the stock of the Company, and in failing to hold and decide that such an amendment, when so construed, constitutes an impairment of the contract contained in the articles of incorporation of said Company, contrary to Article I, Section 10 of the Constitution of the United States. (R. 86).

5.

The Supreme Court of the State of Utah erred in so construing the provisions of R. S. U. 1933, 100-1-13 so that the articles of incorporation of the Provo Bench Canal & Irrigation Company may lawfully be amended by a majority vote of its stockholders so that such Company may become surety for the payment or performance of any contract, promissory note or other obligation that may be or has been entered into with the United States or with any other person, firm, or corporation in which said Company

has acquired by subscription, or otherwise, shares of stock, water or water rights or other rights incidental thereto, and in failing to adjudge and decree that such an amendment constitutes an impairment of the contract contained in the articles of incorporation of such Company, contrary to Article I, Section 10 of the Constitution of the United States. (R. 87).

6.

That the Supreme Court of the State of Utah erred in holding and deciding that the Board of Trustees of the Provo Bench Canal & Irrigation Company, either with or without authority from a majority vote of its stockholders, may lawfully enter into a contract for the purchase of 2,000 shares (each share to represent one acre foot of water per annum) from the Provo River Water Users' Association for the purchase price not to exceed $152,000, and to pay not to exceed $53,200 on account of the default of some other stockholder in the payment of the stock subscribed by such other stockholders, and to raise the money with which to pay said sums by assessments levied against all of the outstanding stock of the said Company even though some of the stockholders cannot derive any benefit from the stock or water so purchased. (R. 88).

7.

That the Supreme Court of the State of Utah erred in holding and decreeing that the stock of the Provo Bench Canal & Irrigation Company may lawfully be assessed to pay for water purchased by it for irrigation purposes under a project to be constructed and controlled by the United States of America, and hence such water, under the laws of Utah, must be made appurtenant to specified lands. (R. 88).

8.

The Supreme Court of the State of Utah erred in holding and deciding that the Board of Trustees of the Provo Bench Canal & Irrigation Company may lawfully enter

into a contract and enforce the performance thereof by the Company, either with or without a majority vote of the stockholders of said Company whereby the Company becomes obligated to provide for the distribution of the additional water purchased and the costs thereof to be paid by the levy of assessments on all the outstanding stock of the Company. (R. 88).

9.

The Supreme Court of the State of Utah erred in holding that the Board of Trustees of the Provo Bench Canal & Irrigation Company may lawfully, either with or without authority of a majority vote of the stockholders of the Company, enter into a contract on behalf of the Company, whereby the Company becomes obligated to levy assessments on its stockholders without regard to whether they will or will not derive any benefit from the purchase of the additional water and without regard to whether some of the stockholders do or do not own any land to which the additional water may be made appurtenant. (R. 88).

10.

The Supreme Court of the State of Utah erred in holding and deciding that the Provo Bench Canal & Irrigation Company may lawfully purchase water for irrigation purposes under a project which is being constructed and is to be controlled by the United States of America, through its agent, The Provo River Water Users' Association, in the absence of the Provo Bench Canal & Irrigation Company owning any land to which such water may be made appurtenant, and in light of the provisions of the contract and the Warren Act which preclude the purchase by any one person of more water than is sufficient to irrigate 160 acres of land. (R. 89).

11

The Supreme Court of the State of Utah erred in holding that the Provo Bench Canal & Irrigation Company may,

without the consent of all of its stockholders, levy and collect assessments on all of the stock of the Company to purchase water which must be put to a beneficial use and which will benefit only those stockholders who are in need of additional water. (R. 89).

12

The Supreme Court of the State of Utah erred in holding and deciding that the Provo Bench Canal & Irrigation Company may lawfully, without the consent of all its stockholders, mortgage all of its property and property rights to secure the payment of a water right which must become appurtenant to specified lands of such of its stockholders as may put such water to a beneficial use. (R. 89)

13.

In said suit there was drawn in question the decision of said Supreme Court of the State of Utah sustaining the validity of the amendments to the articles of incorporation of the Provo Bench Canal & Irrigation Company and the proposed contract between the said Company and the Provo River Water Users' Association in this, that if the articles are amended in the manner proposed and the contract entered into and carried out, it will result in the impairment of the contract contained in the articles of incorporation of the Provo Bench Canal & Irrigation Company, contrary to the provisions of Article I, Section 10 of the Constitution of the United States and in depriving the plaintiffs of their property without due process of law, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States, for which errors plaintiffs pray that the said judgment and decree of the Supreme Court of the State of Utah which became final on November 12, 1940, in the above entitled cause, be reversed and judgment rendered in favor of the plaintiffs.

V.

SUMMARY OF ARGUMENT

POINT I.

The water represented by the shares of stock to be purchased by the respondent Provo Bench Canal & Irrigation Company from the Provo River Water Users' Association, an agency of the United States of America, must be appurtenant to specified lands under both Federal and State law. The capital stock owned by the petitioners herein in the respondent Provo Bench Canal & Irrigation Company is personal property, the equitable title to which is in the owners of the stock; only the legal title being in the Company. Being personal property the stock may not be said to be appurtenant to land, nor may such stock be said to be benefitted by the purchase of additional water.

POINT II.

The adoption of the amendment to the articles of incorporation of the respondent Provo Bench Canal & Irrigation Company by a majority vote of its stockholders, especially when viewed in the light of the contract that the Company proposes to enter into with the Provo River Water Users' Association and to enforce, pursuant to the amendment of the articles of incorporation of the Company, constitutes an impairment of the contract contained in the articles of incorporation of the Company contrary to the provisions of Article I, Section 10 of the Constitution of the United States. This claim was duly set up at the inception of the action in the district court of Utah County, Utah, and in the Supreme Court of the State of Utah, and was by the Supreme Court of Utah decided against the plaintiffs below, petitioners here. Thus a Federal question is presented to this Court.

POINT III.

When the provisions of the laws of the State of Utah relied upon by the respondent Provo Bench Canal & Irrigation Company as the basis for the authority of a majority of the stockholders of that Company to amend its articles of incorporation in the manner proposed and to enter into and enforce the proposed contract, such contract when enforced will result in depriving the petitioners of their property and will deny them the equal protection of the law contrary to the Fourteenth Amendment to the Constitution of the United States. Such question was timely presented in the courts below and decided against the petitioners here, plaintiffs below. In such particular a Federal question is presented here.

POINT IV.

By the construction given by the Supreme Court of the State of Utah to the Reclamation laws of the United States of America the petitioners herein are deprived of their rights and immunities under the Constitution of the United States, namely, the Fourteenth Amendment thereof, in that they will be compelled to pay for the purchase price and the cost and expense of perpetually maintaining and distributing water which they cannot beneficially use and which must be made appurtenant to the lands of others who can beneficially use the same. Such question was duly presented to the court below in that the respondent company by the proposed contract involved in this controversy expressly obligates the Company to comply with the Acts of Congress dealing with Federal irrigation projects.

POINT V.

The decision of the Supreme Court of the State of Utah has decided a question of substance, namely, has given

effect to Acts of Congress touching the Reclamation Laws of the United States, namely, the Reclamation Act of June 17, 1902 (32 Stat. 388), the Warren Act of February 21, 1911 (36 Stat. 925) and the Act of August 11, 1916, Ch. 319, Section 2 thereof, (39 Stat. 506) in a way probably not in accord with applicable decision of this Court, in that by the decision of the Supreme Court of the State of Utah water developed under a Federal project must be paid for not by the persons who will be benefitted thereby, nor in proportion to the benefits derived from the project, nor by persons who can beneficially use the water, nor by persons owning land to which the water may be made appurtenant, but by persons who from time to time owned shares of stock in the respondent company, which is a mutual irrigation company organized under the laws of the State of Utah. The proposed contract between the respondent company and the Provo River Water Users' Association requires the respondent company to comply with the Acts of Congress above mentioned. Thus in such particular a Federal question was timely presented to the courts below, and is reviewable by this Court.

ARGUMENT

POINT I.

The right to the use of water is so unlike other property rights in a number of particulars that it may be of aid at the outset to call attention to some of the laws peculiar to water rights in the Western area of the United States where irrigation is necessary to produce profitable crops. The Constitution of the State of Utah, Article XIV, Section 1, provides:

> "All existing rights to the use of any of the waters of this State for any useful or beneficial purpose are hereby recognized and confirmed."

Revised Statutes Utah, 1933, 100-1-1, as Amended by Laws of Utah 1935, Chapter 105, Section 100-1-1, Page 195, provides:

"All waters in this State whether above or under the ground are hereby declared to be the property of the public, subject to all existing rights to the use thereof."

Revised Statutes of Utah, 1933, 100-1-3, provides:

"Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this State."

This is also required under the Act of Congress known as the

Reclamation Act of June 17, 1902 (32 Stat. 388), Revised Statutes of Utah, 1933, 100-1-4, as Amended by Laws of Utah, 1935, Chapter 104, Section 100-1-4, Page 194, provides in part:

"When an appropriator or his successor in interest shall abandon or cease to use water for a period of five years the right shall cease and thereupon such water shall revert to the public and may be again appropriated as provided in this statute."

Revised Statutes of Utah, 1933, 18-4-7

provides that in the case of full-paid stock, all stock subject to assessments must be assessed equally. Assessments within an irrigation district must be based upon the assessed benefits accruing to each of the various tracts of land irrigated by the water allotted to each tract of land within the irrigation district.

Laws of Utah, 1919, Chapter 68 at Page 112, and Sections 19 and 20 of Chapter 68, Pages 89 and 90, Laws of Utah, 1929, R S. U. 1933, 100-10-11

provides that a water right represented by shares of the stock in an incorporated irrigation company is personal property, while water appurtenant to land is real estate.

Under Federal projects water used for irrigation must be appurtenant to the land. Both State and Federal law make this requirement.

Revised Statutes of Utah, 1933, 100-1-14, as Amended by Laws of Utah, 1937, Chapter 130, Section 100-1-14, Page 237.

The Act of Congress approved June 17, 1902, known as the Reclamation Act (32 Stat. 388), paragraph eight thereof requires that water under a Federal project must be appurtenant to land. When an irrigation district is formed as by law provided water may be allotted to the lands within the district and thus become appurtenant to the lands to which water is allotted.

Laws of Utah, 1919, Chapter 68, Page 204.
Laws of Utah, 1929, Chapter 68, Page 88.

The Act of Congress known as the Warren Act, approved February 21, 1911, Chapter 141 (36 Stat. 925) and the Act of Congress approved August 11, 1916, Chapter 319 (39 Stat. 566) provides for lands within irrigation districts to have water allotted thereto based upon the benefits derived by the land on account of the water so made appurtenant thereto. In a mutual irrigation company such as the respondent Provo Bench Canal & Irrigation Company the equitable title to the water right is represented by the shares of stock and in the stockholders. Only the legal title is in the corporation.

Kinney on Irrigation and Water Rights, 2d Edition, Vol. 3, Sec. 1481, Page 2661.

It follows that a mutual irrigation company may not lawfully dispose of any of the waters, the equitable title to which is in the stockholders, to anyone other than a bona fide stockholder.

McDermott v. Anaheim, Etc., 124 Calif. 112; 56 P. 779.

POINT II.

Ever since the decision rendered in the case of

Dartmouth College v. Woodward, 4 Wheat (U. S.) 518; 4 L. Ed 639

to the present time this Court has adherred to the doctrine that articles of corporations constitute a contract. It is said by the learned author of

Thompson on Corporations, 3rd Ed., Vol. 1, Page 417,

that articles of incorporation constitute a contract in different aspects:

(a) Between the State and the corporation.

(b) Between the State and the stockholders.

(c) Between the corporation and the stockholders.

(d) Between the State and third persons who have dealt with the corporation on the faith of the grant.

(e) Between the stockholders themselves.

In order to lessen the effect of the doctrine announced in the Dartmouth College case a number of States, including Utah, have adopted Constitutional provisions reserving to the State the right to amend or repeal laws relating to corporations.

Article XII, Section 1, of the Constitution of Utah provides:

"Corporations may be formed under general laws, but shall not be created by special acts. All laws relating to corporations may be altered, amended or repealed by the legislature, and all corporations doing business in this State, may, as to such business, be regulated, limited or restrained by law."

The effect of the foregoing Constitutional provision and similar provisions in other States have frequently been

before the Courts of last resort. The legal effect of the foregoing provision of the Utah Constitution was before the Supreme Court of the State of Utah in the case of

Gary v. St. Joe Mining Company, 32 Utah 497; 91 Pac. 369; 12 L.R.A. (N. S.) 554.

In that case it is in effect held that the foregoing provision in the Utah Constitution is applicable solely for the benefit of the public and that it does not authorize the legislature to change or authorize the majority or any number less than all of the stockholders of a corporation to amend the articles thereof so as to materially affect the rights of the stockholders among themselves, or between themselves and the corporation.

In Vol. 1, Thompson on Corporations, 3rd Ed., Page 458, Section 364, it is said:

> "However sweeping may be the reserved right of amendment the legislature cannot, by an amendatory act, affect or destroy the rights of stockholders. The reason for this is that the Constitutional provisions against impairing the obligation of contracts, and providing for due process of law and compensation for property all stand between the State and the stockholder"

This is the doctrine announced by this Court in

Greenwood v. Freed Company, 105 U. S. 13; 262 L. Ed. 961.

By a long line of decisions this Court has held that when a question is raised as to the validity of State legislation involving the impairment of a contract, and such question is raised in the State Court a Federal right is involved. In such cases the jurisdiction of this Court does not depend upon the form in which the legislative action is expressed but rather upon its practical effect and operation as construed and applied by the State Court of last resort, and this is true irrespective of the process of reasoning by which the decision is reached or the precise ex-

tent to which reliance is placed upon the subsequent legislation.

McCullough v. Virginia, (Va. 1898) 172 U. S. 102, 116, 117; 19 S. Ct. 134; 43 L. Ed. 382, 387, 388

Houston, etc., R. Co. v. Texas, (Tex. 1900), 177 U. S. 66, 77; 20 S. Ct. 545; 44 L. Ed. 673, 680.

Terre Haute, etc. R. Co. v. Indiana, (Ind. 1904), 194 U. S. 579, 589; 24 S. Ct. 767; 48 L. Ed. 1124, 1129.

Louisiana v. New Orleans, (La. 1909), 215 U. S. 170, 175; 30 S. Ct. 40; 54 L. Ed. 144, 147.

Fisher v. New Orleans, (La. 1910), 218 U. S. 438, 440; 31 S. Ct. 57; 54 L. Ed. 1099

Carondelet Canal & Nav. Co. v. Louisiana, (La. 1914), 233 U. S. 362, 376; 34 S. Ct. 627; 58 L. Ed. 1001, 1006.

Louisiana R. & Nav. Co. v. Behrman, (La. 1914), 235 U. S. 164, 170; 35 S. Ct. 62; 59 L. Ed. 175, 180.

So also when this Honorable Court is called upon in the exercise of its jurisdiction to decide whether State legislation impairs the obligation of a contract, it will determine for itself and upon its own independent judgment whether there is a contract and if so what obligations arose from such contract, and whether any of the obligations thereof have been impaired.

Detroit United Railway v. Detroit, (Mich. 1916), 242 U. S. 238, 249; 37 S. Ct. 87; 61 L. Ed. 268.

Southern Wisconsin Railway v. Madison, (Wis. 1916), 240 U. S. 457, 461; 36 S. Ct. 400, 401; 60 L. Ed. 739.

St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 147; 21 S. Ct. 575; 45 L. Ed. 788, 791.

The petitioners here, plaintiffs below, in their complaint set out in full the original articles of incorporation of the respondent company, the proposed amendments to the

articles of incorporation and the proposed contract between respondent Provo Bench Canal & Irrigation Company and the Provo River Water Users' Association. (R. 2 to 6). They alleged that they would derive no substantial benefit as a result of the proposed purchase of additional water. (R. 14-15); that the stock in the respondent company will be assessed for the payment of the purchase price of additional water and that it would be permitted to engage in a business and venture not contemplated by and contrary to the contract entered into by its stockholders and their successors, and in violation of the provisions of Article I, Section 18 of the Constitution of Utah, and Article I, Section 10, of the Constitution of the United States, (R. 15), and that petitioners here, plaintiffs below, and other stockholders similarly situated will suffer irreparable injury. (R. 15).

Upon the stipulated facts the trial court made its conclusions of law in harmony with the allegations of the complaint. (R. 61-62). It was expressly held by the trial court that if the articles of incorporation of respondent company were amended in the manner proposed and the proposed contract entered into and enforced, it would constitute an impairment of the contract entered into by the incorporation of defendant company and would be in conflict with the provisions of Article I, Section 10 of the Constitution of the United States.

In the proceedings had before the trial court and also before the Supreme Court of the State of Utah petitioners here, plaintiffs below, contended that the contract contained in the articles of incorporation would be impaired in two particulars:

1. That the law as it existed when the corporation was organized required a vote of two-thirds of the outstanding capital stock of the Company, while the amendment to the articles did not have a two-thirds vote in favor thereof.

2. It was further contended that to permit the corporation to purchase stock in the Provo River

Water Users' Association and to require the stockholders of the respondent company to pay for the same would constitute a radical and fundamental change in the articles and result in irreparable injury to the plaintiffs

When the respondent company was organized in 1887 it required a two-thirds vote of the outstanding stock to make an amendment to the articles of incorporation.

Laws of Utah, 1884, Page 701.

In 1905 the law was amended to the effect that in the absence of articles of incorporation providing otherwise, at least a majority amount of the outstanding stock was necessary to amend the articles of incorporation.

Laws of Utah, 1905, Chapter 30, Page 27.

At the time of the incorporation of respondent company there was no law permitting one company to purchase stock in another company. In 1919 the legislature of Utah enacted a law permitting an incorporated irrigation company to purchase capital stock in another similar corporation.

Laws of Utah, 1919, Section 11, Page 180.

That the claim made by the petitioners here, plaintiffs below, was duly and properly raised and was necessary to the decision is made evident by the decision of the Supreme Court of the State of Utah. It was by the Supreme Court of Utah held that because the life of the corporation was extended the law changing the vote required to amend the articles of incorporation and the enactment of the law permitting an incorporated irrigation company to purchase stock in another similar corporation became a part of the articles the same as if written into the articles. (R. 72-73). The Supreme Court of the State of Utah also held that it was immaterial whether the petitioners here, plaintiffs below, did or did not derive any benefit from the purchase of additional water. That in either event the stock in respondent company might lawfully be assessed to pay for the additional water. (R.

76-77). In this connection it may be observed that the authorities relied upon by the Supreme Court of the State of Utah involved legislative enactments where the State itself had an interest involving the relation of the State to the corporation. In this case private, not public, interests are involved. In this case no claim is made that all of the stockholders of respondent company voted to extend the life of respondent company. If a majority of the stockholders of a company may not bind the minority stockholders by directly amending the articles of a corporation, resulting in the impairment of the contract contained in such articles, it is difficult to see how the majority may accomplish that result by the process of extending the life of the corporation. So also is it difficult to see wherein the Provo River Water Users' Association, an agency of the Federal Government, is similar to the respondent company.

We are mindful that this Court is bound by the construction placed upon a State statute by the highest court of the State, however under the doctrine announced in the cases heretofore cited it is the province of this Court to determine for itself whether it will or will not follow the conclusion reached by the State Court as to the question of whether a contract has or has not been impaired by legislative enactment. If the effect of the legislative enactment results in the taking of property without due process of law or denies the equal protection of the law, such fact under the authorities heretofore cited would seem to be of controlling importance.

To avoid repetition we shall discuss this phase of the case under the following heading:

POINT III.

While this Court has repeatedly held that it is only legislative impairment of a contract that falls within the provisions of Article I, Section 10 of the Constitution of the United States, such limitation does not apply to the provisions of the Fourteenth Amendment to the Constitution

of the United States which prohibits any State from depriving any person of property without due process of law or denying to any person the equal protection of the law. The action of State courts, as well as legislative action, falls within the protection of the Fourteenth Amendment.

> Great Northern Railway Company v. Sunburst Oil & Refining Company, 287 U. S. 358; 53 S. Ct. Rep. 145; 71 L. Ed. 360.

In their complaint filed in the fourth judicial district court of Utah, petitioners here, plaintiffs below, alleged that they had sufficient water with which to irrigate their lands, and that they would derive no substantial benefit from the purchase of additional water (R. 14-15). Also that their stock would be assessed to pay for the cost and expense of the purchase of the additional water and the maintenance of the water works. (R. 15). Evidence was offered to support these allegations. (R. 61). The offered proof was rejected by the trial court. (R. 61). Error was assigned because of such refusal. (R. 69). The Supreme Court held that it was immaterial whether petitioners here, plaintiffs below, did or did not derive any benefit as a result of the purchase of additional water. (R. 77).

A petition for rehearing was filed (R. 81-82). A written brief and a reply brief was filed in support of the petition for rehearing, in which it was urged that if, as the court found, the law passed after the incorporation of respondent company became a part of its articles of incorporation by reason of the extension of the life of the corporation, by the same token the law requiring the water to be purchased appurtenant to specified lands became a part of the articles of incorporation; thus the proceedings had in the trial court and the Supreme Court of the State of Utah were sufficient to raise the question of the claim that the petitioners here, plaintiffs below, will be deprived of their property without due process of law if the proposed

contract is executed and enforced, finds support in the case of

Gregia v. Modesto Irrigation District, 164 U. S. 179.

In that case, as in this, reliance was had on

Article I, Section 10 of the Constitution of the United States.

In that case as in this, the real controversy was that the operation of a statute would deprive the complainant of property without due process of law, and in that case, as in this, there was a provision for testing the validity of the proceedings. This Court held that it would look to the real matter in dispute and that a Federal question was presented.

POINT IV.

Much of what we have already said in the light of the provisions of the laws of the State of Utah is applicable when viewed in the light of the acts of the Congress of the United States. It will be seen that the provisions of the Reclamation Act (32 Stat. 388), the Warren Act (36 Stat. 905) and the Act approved August 11, 1916 (39 Stat. 506) make the same requirements as do the laws of the State of Utah, namely, that the water shall be appurtenant to land; the beneficial use shall be the measure and the limit of the right to water, and that the cost of constructing and maintaining Federal irrigation projects must be equitably apportioned by the Secretary of the Interior.

These Acts are expressly mentioned in the contract which the respondent company proposes to enter into with the Provo River Water Users' Association. The respondent company agrees and obligates itself to distribute the water as required by these Federal laws. If the water to be purchased is distributed according to the Federal law, the petitioners here, plaintiffs below, may derive no benefit

from the additional water, or if they should use the additional water they will lose the water which they presently own. This claim was made by the petitioners here, plaintiffs below, in both the trial court and the Supreme Court of the State of Utah, and such claim was made in the trial court and Supreme Court of the State of Utah, in that if the proposed contract is enforced, including a compliance with the Acts of Congress, the petitioners herein, plaintiffs below, will be deprived of their property without due process of law and denied the equal protection of the law.

POINT V.

The plan whereby the respondent company proposes to purchase additional water is essentially a contract with the United States, although nominally such contract is with the Provo River Water Users' Association. To characterize the water to be purchased as shares of stock in the Provo River Water Users' Association does not remove the transaction from the necessity of compliance with Federal law, nor does the fact that the proposed contract requires the respondent company to comply with the Federal law have any effect. The proposed contract when read in the light of the Acts of Congress requires among other things the following:

The Company must make the water to be purchased appurtenant to specified lands. That may be done in one of two ways. Either by contract with the landowner or by the formation of an irrigation district, and when the district is so created, allotments of water may be made to the land within the district as provided by

Chapter 68, Laws of Utah, 1919, as Amended by Chapter 68, Laws of Utah, 1929.

In either event the assessments for the payment of the construction and maintenance cost of the project constructed for the purpose of furnishing water must

be apportioned equitably; that is, in proportion to the benefits to the land to which the water is made appurtenant.

Act of June 17, 1902, Chapter 1903, Section 8, 32 Stat. 388, Act Approved August 11, 1916, Chapter 319, Section 2 Thereof, 39 Stat. 506.

The Federal law requires and the defendant company obligates itself to put the water to a beneficial use, therefore petitioners being already supplied with sufficient water to take care of their needs with the water represented by their presently owned shares of stock in respondent company, the purchased water must be used by others. So also, the payment of the price of the water to be purchased must be paid for by levying assessments on the stock of the stockholders of the Company.

As will be seen from an examination of the articles of the Company there is no other way of securing the necessary money with which to pay the purchase price of the water and the maintenance of the irrigation works. (R. 12). The assessments on the stock must be equal and uniform.

R. S. U. 1933, 18-4-7.

So also, respondent company, under the proposed contract, obligates itself to pay not only for the water to be purchased by it, but also for water in an amount not to exceed $53,200, occasioned by the default of other subscribers. (R. 57-58). Moreover, the respondent company under the proposed contract agrees to execute a mortgage upon all its property as security for the payment of its obligations under the contract. (R. 59).

In his concurring opinion Mr. Justice Wolfe indicates that he entertains doubts about the power of the respondent company to do what is being attempted without the consent of all the stockholders, but apparently yielded to the opinion of his associates, because unless the majority of

the stockholders could bind the minority, those who need water would be unable to secure the same. The soundness of the view that a majority should be permitted to bind the minority because otherwise the majority may be deprived of the opportunity to purchase additional water may well be open to question, but in any event, so far as is made to appear, there is no reason why those who desire additional water may not purchase the same. If a landowner desires more water there is no apparent reason why he may not purchase one share of water in the Provo River Water Users' Association for each acre foot per annum of water he may deem necessary to properly supply his needs.

The plan here attempted in its final analysis means that the landowners who already own sufficient or nearly sufficient water to supply their needs must in effect purchase or, more accurately, pay for the purchase of additional water without regard to their needs, with the result that they are required to pay for that which the laws of the State of Utah and the Acts of Congress and the proposed contract expressly prohibit them from owning. If perchance they could continue to utilize the additional water, still those stockholders who are in need of additional water would not under the proposed contract be able to secure the same unless it be held that those who pay for water which they cannot beneficially use must permit those who can put the purchased water to a beneficial use to use the same without paying therefor.

Thus the inevitable result that will follow from the enforcement of the proposed contract will be that these petitioners, plaintiffs below, will be denied their rights and immunities under the Acts of Congress above referred to, in that they will be required to pay for water that they cannot beneficially use, that is not appurtenant to their

lands, and that they have not consented to purchase. Such claim was duly made in the trial court and the Supreme Court of the State of Utah, and presents a Federal question reviewable by this Court, namely, does the proposed contract and its enforcement offend against the provisions of the Reclamation Act, the Warren Act and Acts of Congress supplementary thereto and Acts amendatory thereof?

Murdock v. City of Memphis, 20 Wall (U. S.) 590; 22 L. Ed. 429.

California Bank v. Kennedy, 167 U. S. 362; 17 S. Ct. 831; 42 L. Ed. 198.

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a Writ of Certiorari and that thereafter upon granting said writ this cause be reviewed and the decision of the Supreme Court of the State of Utah be reversed.

Respectfully submitted,

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